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**Curaleaf Massachusetts, Inc. and United Food and Commercial Workers Union Local 328, Petitioner.** Case 01–RC–259277

March 23, 2021

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN  
AND RING

The Employer’s request for review of the Acting Regional Director’s Supplemental Decision to Hearing Officer’s Report on Challenged Ballots is denied as it raises no substantial issues warranting review.<sup>1</sup>

Dated, Washington, D.C. March 23, 2021

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Lauren McFerran, Chairman

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Marvin E. Kaplan, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>1</sup> In denying review, we agree with the Acting Regional Director that the six transferees are temporary employees. In evaluating temporary-employee status, the Board applies the “date certain” test, under which an employee will be eligible to vote if their tenure of employment is “uncertain” on the eligibility date. See *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). Over the years, the Board has clarified that the “date certain” test “does not require a party contesting an employee’s eligibility to prove that the employee’s tenure was certain to expire on an exact calendar date,” and that “[i]t is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.” *Id.* A party can prove that the prospect of termination is “finite” and “ascertainable” (or “certain,” to echo the “date certain” test) “either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created.” *Marian Medical Center*, 339 NLRB 127, 128 (2003) (emphasis added). In this regard, the Board’s “date certain” test acknowledges, as a matter of common sense, that it may be evident that an employee has been hired for a finite term of employment—such as in conjunction with a particular project or an emergency circumstance—even though, on the eligibility date itself, the parties may not yet be able to identify the precise date on which this finite and temporary employment will end.

That is precisely the case here: we agree with Acting Regional Director, largely for the reasons discussed in his decision, that the six transferee employees were transferred to the Hanover facility to help cover staffing shortages that arose in the early stages of the COVID-19 pandemic, and that, as of the eligibility date, all parties were aware that the transferees’ time at Hanover would be finite and limited in scope to the staffing shortages—even though no one knew the precise date on which the staffing shortages would end. In addition, we rely on the evidence demonstrating that most of the transferees stopped working at Hanover after May 2020 only to the extent that this evidence corroborates the evidence that existed on the eligibility date, which indicates that the employees were only assigned to Hanover for a finite term. See *Marian Medical Center*, supra at 129 (observing that “the evidence shows that the Employer transferred [the employee] back to [the previous facility] as planned[]”). We therefore do not rely on this postelection evidence to make an “after-the-fact” determination that was not evident as of the eligibility date itself. Cf. *Georgia Pacific Corp.*, 201 NLRB 831, 832 (1973) (“Here, . . . the election has already been conducted and the evidence upon which the Employer would have us rely relates *exclusively* to events which have occurred subsequent to the date of the election. For very practical reasons, we cannot determine voter eligibility on the basis of after-the-fact considerations.”) (emphasis added).